IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-703.

CAREY,
APPELLANT,

v.

BROWN,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

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Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL PROVISIONS.

STATUTES AND RULES.

OTHER AUTHORITIES.

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Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief amicus curiae bound with this motion in support of appellant.

New England Legal Foundation has the consent of counsel for appellant to the filing of this brief. Counsel for the appellee would not consent. Copies of appellant's letter and our request to appellee are on file with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors com-

posed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation's attorneys participated in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) as counsel for amicus curiae The New England Council, Inc. (See 435 U.S. at n. 22.)

The Foundation, due to its unique public interest perspective and established interest in First Amendment issues involving New England residents, can provide the Court with a more complete argument of the issues in this case.

The Foundation is particularly concerned that if the Court of Appeals' ruling is affirmed, then the rights of citizens to domestic privacy will be lost. It is New England Legal Foundation's position that the Court of Appeals' decision should be reversed.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellant.

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Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

Introductory Statement.

New England Legal Foundation, a non-profit corporation, broadly representative of New England interests, files this brief as amicus curiae in support of appellant.

This brief discusses the circumstances in which the state may properly restrict the place of speech. The brief demonstrates that the restrictions set forth in the Illinois Residential Picketing statute are legitimately based on the place of speech without reference to a message. Once it is established that the provisions of the ban are determined by

the place of speech, this brief demonstrates that the benefits of restricting expression at the place of a person's private residence outweigh the costs of speech limitation.

New England Legal Foundation adopts appellant's statement of the facts and opinions below.

Questions Presented.

New England Legal Foundation believes that this appeal presents the following issues:

1. Whether the state may restrict the place of speech.
2. Whether in the instant case, the provisions of the ban on residential picketing are based on the place of speech, without reference to a message, and are precisely tailored to serve a legitimate and substantial public interest.
3. Whether in the instant case, the benefits of restricting expression at the place of a person's private residence and sanctuary outweigh the costs of speech limitation.

Summary of Argument.

1. In order to protect the safety, peace and well-being of its residents, the state may impose reasonable restrictions on the place of speech. A state restriction does not violate the First Amendment so long as the restriction is aimed at the communication's compatibility with the intended activities of a place, rather than at its message.
2. In the instant case, the ban on residential picketing is based on the incompatibility of picketing with a person's right to be left alone in his private domicile. The statute is precisely tailored to protect the legitimate

interests of residents and to guard those rights of expression that could not be effectively protected anywhere else.
3. In the instant case, the benefits of protecting citizens' rights to private sanctuary outweigh the costs of limiting speech. The communication of the picketers can be effectively redirected to other locations. However, the lost privacy interests are irreplaceable.

Argument.

I. The State May Restrict the Place of Speech.

This Court has recognized that the right to communicate is not limitless. *Schneider v. State,* 308 U.S. 147 (1939); *Poulos v. New Hampshire,* 345 U.S. 395 (1953); *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970). As Justice Reed stated:

> The First and the Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life. *Breard v. Alexandria,* 341 U.S. 622, 642 (1951).

In order to protect the safety, peace and well-being of its residents, the state may impose reasonable restrictions on the location of speech. *Thornhill v. Alabama,* 310 U.S. 88, 105 (1940); *Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940); *Cox v. New Hampshire,* 312 U.S. 569, 575 (1941); *Poulos v. New Hampshire,* 345 U.S. at 398; *Adderley v. Florida,* 385 U.S. 39, 46-48 (1966).[1] Restrictions on the location of speech

[1] These decisions have consistently recognized that reasonable time, place and manner regulations of picketing may be necessary to further significant government interests.

are reasonable if its expression is incompatible with the normal activities of a particular place. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). To make this determination, the state must individually examine the uses and purposes of each forum. The state may ban the picketing of a courthouse, for example, because the administration of justice must be fair and free from disruptions and pressures. *Wood v. Georgia,* 370 U.S. 375, 384-385 (1962); *Cox v. Louisiana,* 379 U.S. 559, 561 (1965). The state may ban demonstrations at a foreign embassy because the disturbance of foreign officials jeopardizes foreign relations. *Frend v. United States,* 100 F. 2d 691, 693 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939). See also *Jewish Defense League, Inc. v. Washington,* 347 F. Supp. 1300 (D. D.C. 1972).

The state's authority to restrict the place of speech also extends to banning those forms of communication that are incompatible with a particular location. The state may ban loudspeakers, sound trucks and other amplification devices from residential neighborhoods because loud noise interferes with normal, private domestic life. *Kovacs v. Cooper,* 336 U.S. 77, 89 (1949). See also *People v. Phillips,* 147 Misc. 11, 263 N.Y. Supp. 158, 159 (1933); *Maupin v. City of Louisville,* 284 Ky. 195, 144 S.W. 2d 237, 240 (1940); *Hamilton v. City of Montose,* 109 Colo. 228, 124 P. 2d 757, 761 (1942). The state may ban mass assemblies at jailhouses. *Adderley v. Florida,* 385 U.S. at 47, 48. The state may ban prisoners' statements to the press in specific jail cells. *Pell v. Procunier,* 417 U.S. 817, 827 (1974); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 846-850 (1974). The state may ban a political speech at a military base. *Greer v. Spock,* 424 U.S. 828, 837-838 (1976).

In all of the above cases, the state's restriction on speech was aimed not at the nature of the message, but at the communication's incompatibility with the intended activities of a place.

II. In the Instant Case, the Provisions of the Ban on Residential Picketing Are Based on the Place of Speech, without Reference to a Message, and Are Precisely Tailored to Serve a Legitimate and Substantial Public Interest.

The statute challenged here prohibits picketing at the place of a person's private residence because picketing interferes with the quiet, secure and stable enjoyment of family life.[2] The statute recognizes that the use of a residence as a "place of business" or as a "place of holding a meeting" or as "premises commonly used to discuss subjects of general public interest" extends the activities of the residence beyond those of a private sanctuary,[3] and accordingly it permits picketing at such places.[4] Moreover, the statute recognizes that when a householder makes his residence a "place of employment" for someone else, he waives the protection of

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[2] The statute's preamble states:

> The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life. Ill. Rev. Stat. c. 38, § 21.1-1.

[3] Courts have recognized that the normal activities of a person's residence can extend beyond those of a private sanctuary. See *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing,* 433 Pa. 578, 252 A. 2d 622 (1969).

[4] The substantive provisions of the statute are:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. Ill. Rev. Stat. c. 38, § 21.1-2.

privacy in disputes related to the "place of employment." The employer's residence in these disputes is the only place at which picketing could be meaningfully directed.[5] Although picketing in these disputes by necessity reflects labor-related issues, the exemption is effectively determined by the place of the dispute, and not by reference to the content of the message. The provisions of the statute are therefore consistent with the requirement that the state individually examine the uses and purposes of each place and tailor restrictions on speech to be compatible with these uses and purposes.

The Appeals Court below interpreted this statute as allowing picketing at a residence used as a place of employment only if the subject matter was labor-related. *Brown v. Scott,* 602 F. 2d 791, 793-794 (7th Cir. 1979). Such a content-based restriction on speech was struck down in *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99 (1972). In *Mosley,* the City Ordinance banned non-labor picketing within 150 feet of a school on the ground that it was more disruptive than labor picketing. Since there was no showing in the record that labor picketing was, in fact, less disruptive, the only conceivable basis for the distinction among picketers was the message on the picket sign.[6]

[5] Persons seeking to communicate and having only one possible forum have been allowed use of that forum, when others with multiple options have not. *Albany Welfare Rights Organization v. Wyman,* 493 F. 2d 1319, 1323 (2d Cir. 1974). The public's interest in containing picketing to the locus of dispute is also not a novel concept. See *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe,* 315 U.S. 722, 727 (1942); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 320 (1968).

[6] The City argued that non-labor picketing is more prone to produce violence than labor picketing. The Court stated that predictions about imminent disruption from picketing involve judgments appropriately made on an individual basis and not by means of broad classifications based on subject matter. 408 U.S. at 100 and 101.

But here, the distinction between labor and non-labor content is not a necessary or even a reasonable basis for interpreting the provisions of the statute challenged. Since this statute broadly permits picketing at a residence used as a "place of business," the only instance where the Appeals Court's concern about content-based restrictions could conceivably be at issue is a residence used as a "place of employment" but not as a "place of business." Thus, if the Mayor of Chicago[7] had lived above his manufacturing establishment, then the statute contemplates all forms of picketing because such a residence is used as a "place of business." But if he merely employed maids and groundkeepers, then the only relevant place these employees could picket in the event of a controversy is where they were employed. The statute's exemption for picketing in that case would not deny, but rather assure equal protection.

The Appeals Court expresses concern that, in the event of a labor dispute between the Mayor and his gardener, the state treats the gardener's picketing differently from other forms of picketing.[8] Such a concern is not mandated by the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The Equal Protection Clause does not require that "things which are different in fact or opinion . . . be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 (1940). It does require that differences be directly related to the legitimate legislative objective of the statute. *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Lovell v. Griffin,* 303 U.S. 444, 450-451 (1938); *Schneider v. State,* 308 U.S. at 164; *Shelton v. Tucker,* 364 U.S. 479, 487-489 (1960); *N.A.A.C.P. v. Button,* 371 U.S. 415, 438-439 (1963); *Cox v. Louisiana,* 379 U.S. at 578-579; *Davis v. Francois,*

[7] The Mayor's home was the site of picketing in the instant case. See *Brown v. Scott,* 462 F. Supp. 518, 519 (N.D. Ill. 1978).

[8] *Brown v. Scott,* 602 F. 2d at 794.

395 F. 2d 730, 734 (5th Cir. 1968); *Reed v. Reed,* 404 U.S. 71, 76 (1971). In the instant case there is an exact fit between the distinction drawn and the result desired. The distinction here allows for communication which could not be effectively received anywhere else. At the same time, it is consistent with the legislative objective of protecting private residences.

To argue that the state should permit all forms of picketing by all persons once the Mayor's gardener engages in picketing the Mayor's residence in the event of a labor dispute, is to confuse the protection afforded to the gardener to speak with the protection afforded to the Mayor not to be indiscriminately harassed in his home. There is no reason why the state cannot simultaneously protect the First Amendment rights of the gardener and the privacy rights of the Mayor. If this Court should affirm, then in the event of a labor dispute between Mayor and gardener, the state must either permit everyone including the gardener to picket, or let no one picket. If the state deems no one can picket, then the rights of the gardener are unnecessarily lost. Reversing the Court below, and upholding the statute, accommodates both the Mayor and gardener. No other alternative form of regulation would abate the evils of a disorderly society without infringing unnecessarily on a First Amendment right. *Shelton v. Tucker,* 364 U.S. at 488.

Allowing pickets at the Mayor's residence, when it becomes a place of employment involved in a labor dispute, is the only instance in which such expression is relevant to the use of the dwelling. At no other time and for no other purpose would the Mayor's residence rise to the level of a place of public dialogue. The object of the picketing in *Mosley,* by contrast, was a public school. Public schools in a community are important institutions and are often the focus of significant grievances. *Grayned v. City of Rockford,* 408 U.S. at 118. Although schools were not created primarily for public dialogue, Laurence Tribe, one noted commentator, points out, their purposes are closely linked to the expression of ideas. The robust exchange of ideas is an important part of the educational process.[9] See *Tinker v. Des Moines School District,* 393 U.S. 503 (1969). As Justice Brennan stated in *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967):

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." *Shelton* v. *Tucker,* [364 U.S.] at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States* v. *Associated Press,* 52 F. Supp. 362, 372 [S.D. N.Y. 1943].

In the case of a public school, no objective is served by allowing pickets with one message and disallowing pickets with another. On the other hand, residential areas are not as closely linked to public expression. *Cohen v. California,* 403 U.S. 15, 21 (1971). This distinction between public school and private residence reinforces the conclusion that the Illinois statute's provisions are precisely tailored to serve a legitimate and substantial public interest.

III. In the Instant Case, the Benefits of Restricting Expression at the Place of a Person's Private Residence and Sanctuary Outweigh the Costs of Speech Limitation.

Once it is established that the provisions of the instant ban are determined by the place of speech, this Court should judge the statute's constitutionality by balancing the rights protected by the state against the rights guaranteed by the

[9] L. Tribe, *Constitutional Law,* §§ 12-21 (1978).

First Amendment. *Konigsberg v. State Bar of California,* 366 U.S. 36, 51 (1961); *N.A.A.C.P. v. Button,* 371 U.S. at 444; *Grayned v. City of Rockford,* 408 U.S. at 116; *Pell v. Procunier,* 417 U.S. 817 (1974); and *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302-303 (1974).

In the case at bar, the Illinois statute protects a person's right to be left alone in the privacy of his home. The legitimacy of this right has been respected by the common law and repeatedly upheld in the courts. Over 80 years ago, Justice Brandeis wrote:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. . . . Warren and Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 196 (1890).

The home is a man's "castle" and his "sanctuary." *Pipe Machinery Co. v. De More,* 36 Ohio Op. 342, 343-344, 76 N.E. 2d 725, 727 (1947). "The right to be left alone is indeed the beginning of all freedom." *Public Utilities Commission v. Pollak,* 343 U.S. 451, 467 (1952) (Justice Douglas—dissent.) As Justice Burger stated in *Rowan v. United States Post Office Department,* 397 U.S. 728, 737 (1970):

> The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality. . . . *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

The home is the place where one retreats from his business associates, neighbors and friends to enjoy a certain solitude he is unlikely to find anywhere else.[10] The home may be the only place where one can shut off unwanted communication

[10] Kamin, *Residential Picketing and the First Amendment,* 61 N.W. L. Rev. 177 (1966-1967).

or an unwelcomed stranger. *Breard v. Alexandria,* 341 U.S. at 644, 645. The home is a place to rest and recharge. *City of Wauwatosa v. King,* 49 Wis. 2d 398, 182 N.W. 2d 530, 537 (1971). The home is a place where family is raised, where parents instill their personal values in children.[11] The home thus offers substantial and necessary benefits to members of our society. In order to enjoy these benefits, a person must be able to stay in his home for as long as and whenever he wants. *Organization for a Better Austin v. Keefe,* 115 Ill. App. 2d 236, 253 N.E. 2d 76 (1969), *rev'd on other grounds,* 402 U.S. 415 (1971). With respect to these benefits, the home has virtually no substitute.

In the case of residential picketing, the state has a substantial interest in protecting a person's right to domestic privacy. Residential picketing would invade the privacy of a person's home in an intolerable way.[12] Picketing is an appeal to the emotions. *Superior Derrick Corp. v. N.L.R.B.,* 273 F. 2d 891, 896-897 (5th Cir. 1960). Picketing is distinguished from pure speech by its ability to cause the viewer personal discomfort.[13] Picketing can create tension in the viewer and capitalize on the viewer's anxieties. As the Court highlighted in *City of Wauwatosa v. King:*

> To those inside and to the neighbors, the home becomes something less than a home when and while the picketing, demonstrating and parading continue. . . . The newsworthiness of the situation stems in part from the tensions created and pressures focused on the home. Such tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical

[11] *Residential Picketing and the First Amendment* at 206-207.

[12] Note, *First Amendment Analysis of Peaceful Picketing,* 28 Maine L. Rev. 203, 207 (1976).

[13] *First Amendment Analysis of Peaceful Picketing* at 208.

> to family privacy and truly domestic tranquility. 182 N.W. 2d at 537.

Picketing forces the homeowner to be exposed to a specific communication or expressive activity. The homeowner thus becomes a captive in his own home.[14] Picketing could disrupt his sleep, conversation or whatever he does at home. Unlike the accosted passersby in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975), the disruption is not momentary. The invasive effects of picketing could extend beyond the target home. Neighbors, with no attachment to the controversy, become captives to the communication. Mail carriers and delivery men are hindered. Children cannot make their way to and from school.[15] As Justice Black, concurring in *Gregory v. City of Chicago,* 394 U.S. 111 (1969), stated:

> I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown. 394 U.S. at 125-126.

"[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

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[14] The harmful consequences of being held a captive audience in one's private residence are magnified by the courts' prevention of captive audiences in even less private forums. In *Lehman v. City of Shaker Heights,* 418 U.S. at 305-308 this Court sustained a municipality's policy of barring political advertising on city buses. That we are often captives outside the sanctuary of the home and subject to objectionable speech and sound does not mean that we must be captives elsewhere. *Public Utilities Commission v. Pollak,* 343 U.S. at 468.

[15] *Residential Picketing and the First Amendment* at 228.

Rowan v. United States Post Office Department, 397 U.S. at 736.[16] In the case at bar, the scales tip unequivocally to the side of personal privacy.

To be sure, picketing at a private residence attracts greater media coverage and can make a forceful impression. Yet these alleged benefits of picketing result from the inappropriateness of the forum as a center for debate. Picketing, with its powerful emotional overtones, can cause the target homeowner to react inappropriately out of annoyance or intimidation. *Brown v. Scott,* 462 F. Supp. at 532-533. This alleged advantage results directly from the captivity of the homeowner. Picketing in the streets in front of private residences affords the picketers a low-cost means of communication. This alleged advantage is hardly unique or substantial, since picketing any other street is equally inexpensive.

The existence of alternative locations is not by itself a justification for abridging speech at a particular place. *Schneider v. State,* 308 U.S. at 163. However, when the advantages of this forum are to be weighed against its disruption of private life, it is proper to note the wide opportunity for other avenues of communication. In fact, other forums that are more relevant to the dispute (e.g., picketing City Hall rather than the Mayor's residence) could offer greater benefits. Moreover, residential picketing is not the only avenue of address for the weak and powerless.[17]

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[16] In *Rowan,* this Court upheld a statute restricting what types of postal communications could enter the home when such communication was per se inconsistent with the privacy interests of the resident. Individual privacy, this Court noted, is entitled to greater protection in the home than on the streets. 397 U.S. at 736-737.

[17] *Residential Picketing and the First Amendment* at 207-208.

The public has a clear interest in guaranteeing free expression of ideas. *Cohen v. California,* 403 U.S. at 24. However, a ban on residential picketing does not stifle ideas. It merely directs that certain locations are inappropriate forums for communication. The statute at issue here does not leave the public with incomplete or inaccurate views. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339 (1974). It does not have an unequal effect on various types of messages. It is not for or against any viewpoint. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 n.31 (1978).

Unquestionably, this is a case where the benefits to citizens outweigh any possible incidental intrusion on First Amendment rights. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461 (1958); *Barenblatt v. United States,* 360 U.S. 109, 126 (1959); *Communist Party v. Control Board,* 367 U.S. 1, 90-91 (1961). In no way do the particular provisions of the Illinois statute or the particular facts surrounding this case negate such a conclusion.[18]

Conclusion.

This case does not rest on the views of those who picketed the home of Chicago's Mayor. The main issue is the protection of a person's right to be left alone in his private residence and sanctuary. The Illinois statute legitimately recognizes what characteristics of a person's place of residence may dilute this right to be left alone. These characteristics of a person's place of residence can be enumerated without refer-

[18] The courts have held that the home of a public figure, such as the Mayor of Chicago, is not made a public forum by virtue of the status of its resident. On the contrary, one's public status is all the more reason for the protection of privacy. *Gregory v. City of Chicago,* 394 U.S. at 125, 126.

ence to the content of any message. To search vainly for a distinction based upon content, but irrelevant to the circumstances contemplated by the statute, advances no First Amendment right. The Court below should be reversed.

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